No. 4079

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GETZ BROS. & CO. OF THE ORIENT, LIMITED,
Plaintiff in Error,

vs.

H. M. SHIREK, doing business under the name and style of THE MERCHANDISE BROKERAGE COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

WARREN GREGORY,
ALLEN L. CHICKERING,
EVAN WILLIAMS,
DONALD Y. LAMONT,
SCHUHL & SCHOENFELD,
Attorneys for Defendant in Error.

No. 4079

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GETZ BROS. & CO. OF THE ORIENT, LIMITED,
Plaintiff in Error,

vs.

H. M. SHIREK, doing business under the name and style of THE MERCHANDISE BROKERAGE COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Although the record is quite brief, it may assist the Court if we first present in chronological order the communications between the parties which took place after the contract was signed.

This contract is dated February 3, 1922, and on the same day the Manager of the Shanghai Branch of the plaintiff in error cabled his home office as follows:

> "Re Plate Cuttings stock—We understand legally must sue buyers before selling."

We draw attention to the fact that this cable did not mention the contract in question or seek any

confirmation thereof. On February 14, plaintiff in error (hereafter called Getz Bros.) wrote defendant in error (hereafter called Shirek) as follows:

"Dear Sirs:

In compliance with our memorandum with you, we cabled to our Home Office on February 3d, as follows:

'Re Plate Cuttings stock—We understand legally must sue buyers before selling.'

We have now received a reply from our Home Office dated February 7th, 1922, in which they refer to our message and advise us to take legal proceedings.

Under these circumstances, the cargo has been turned over to our Compradore, who we will hold for decision of arbitration as to the reliability of the original purchaser.

We regret that we cannot carry out our contract with you and are returning attached our check No. 705 for Taels 900.00 (Nine Hundred) to cover the deposit which you made with us.

Thanking you for the offer, we beg to remain,

Yours very truly,

Getz Bros. & Co. of the Orient, Ltd.

By T. L. Parkhurst,

Manager."

On February 16 the attorney for Shirek wrote Getz Bros. as follows:

"Dear Sirs:

Your letter of the 14th instant addressed to the Merchandise Brokerage Co. has been turned over to the writer for reply. I would like to have a definite answer from you as to whether or not you intend to deliver to my client 370 tons of steel plate cuttings under the terms of your contract dated February 3d. My client

feels that they are entitled to the delivery of this plate.

Yours very truly",

On February 20, Gets Bros. wrote the attorney for Shirek as follows:

"Dear Sir:

Re: Merchandise Brokerage Co.

We acknowledge your favor of February 16th, 1922, and beg to advise that we have been holding for the above (plaintiff) approximately fifty (50) tons of Plate Cuttings that were shipped for our stock.

If they care to avail themselves of this material, it would be necessary for them to take up the cargo by Wednesday by 11 o'clock, otherwise we will consider that they will not accept this offer.

Yours truly,
Getz Bros. & Co. of the Orient, Ltd.
By T. L. Parkhurst,
Manager."

On February 21 the attorney for Shirek wrote Getz Bros. as follows:

"Dear Sirs:

Re: Merchandise Brokerage Co.

I have your kind favor of the 20th instant and beg to say that my clients are willing to accept the fifty tons of plate cuttings mentioned in your letter providing however you agree to deliver the balance of the cargo under the contract within 48 hours. My client feels that they are entitled to the entire lot 370 tons and unless the cargo is delivered, I will be compelled to institute proceedings for damages.

Yours very truly,"

These letters with the contract are the only written documents which passed between the parties or were executed by them. No evidence of any advices from the Home Office of Getz Bros. to their Shanghai Branch was produced other than the alleged copy of the cable contained in the letter of February 14. The original of this cable was not produced and Getz Bros. refused to show it to Shirek (p. 19, also 22). The evidence of the cable as contained in the letter is, therefore, hearsay and not the best evidence, since the original cable was in the possession of Getz Bros. at Shanghai, and the terms of the communication could be shown only by such cable.

The only evidence other than writings and other than that dealing with the amount of the damages suffered is in brief that Parkhurst, the manager of Getz Bros. in Shanghai, told Shirek about February 12th or 13th that he had received a cable from his Home Office, which cable he refused to exhibit; that Getz Bros. did not proceed legally against the original buyers of the cargo, but sold it to a different party (p. 19). There is no evidence as to who these original purchasers were. *The only evidence produced for Getz Bros.* was the testimony of the two expert witnesses, Angus and Reeves as to the market price of the goods and upon the subject of damages. It is significant that Parkhurst was not called.

It is evident, therefore, that the only question which is now before this Court is as to whether or

not *any* contract between the parties ever existed. The document at least *prima facie* purports to be an agreement binding upon both parties for the sale and delivery of certain specifically described merchandise. The subject matter was at that time in Shanghai and is clearly identified. The price and terms of payment also specifically appear. The document is termed in many provisions "a *contract*", and the general language is that the seller "has sold" and the buyer "has bought". Counsel has argued at some length that this document was evidently written upon a stock form, with the exception of the clause which it is claimed negatives the contract and the argument is made that, therefore, more weight should be given to this clause than to the remainder of the contract. The original document was not before the Court and there is no evidence as to the character of any portion of such document. It must, therefore, be a matter of surmise only as to what portion, if any, of the document was especially prepared, but the significant fact is that it *was prepared by Getz Bros.* It is headed (p. 3) in large type "Contract. Getz Bros. & Co., of the Orient, Ltd.".

I.

Argument.

ANY AMBIGUITIES IN THE CONTRACT MUST BE CONSTRUED AGAINST GETZ BROS. BECAUSE THEY PREPARED IT.

It has been said that the reason for this rule is that a man is responsible for ambiguities in his own

expressions, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing more to his advantage. In

Bijur Motor Lighting Co. v. Eclipse Co., 237 Fed. 89,

the Court said:

> "* * * The formal opening words, 'Memorandum of Agreement Reached July 9, 1914, Between the Bijur Motor Lighting Company and Victor Bendix', and the protracted meetings and negotiations before an understanding was reached, make applicable the general rule of strict construction, which requires resolving any doubt as to the true meaning and construction of any of the provisions against the complainant, at whose instigation the parties met for the purpose of reaching an agreement, and by whom or under whose supervision it was prepared or drawn. Wilson v. Cooper et al. (C. C.) 95 Fed. 625; Van Zandt v. Hanover Nat. Bank, 149 Fed. 127, 79 C. C. A. 23; Christian v. First Nat. Bank of Deadwood, S. D., 155 Fed. 705, 84 C. C. A. 53."

Wilson v. Cooper, 95 Fed. 625, 628.

In

Marx v. Am. Malting Co., 169 Fed. 582,

it was held that the fundamental rule in the interpretation of agreements was to ascertain the *prime object* and *purpose* of the parties, and "in case of ambiguity produced by its minor provisions, the latter should be construed so as not to conflict with the main purpose", also

"another reason for adopting a more harmless meaning to this language than one which would defeat the main purpose is that the instrument was prepared by the vendor, and the rule is that in case of doubt or ambiguity arising from the use of words they should be construed most favorably to the other party".

II.

THE PARTIES INTENDED TO MAKE A BINDING CONTRACT. AND IT IS IMMATERIAL WHETHER THAT CONTRACT WAS FOR AN EXECUTORY OR AN EXECUTED SALE.

This subject and others discussed by counsel for Getz Bros. were considered by the learned trial Court in two opinions rendered by him, one upon a demurrer to the complaint (pp. 12-14) and the second when judgment was rendered (pp. 49-57). We request this Court to read these two opinions as we shall not, in this brief, attempt to retraverse the same ground.

It is urged that the use of the words "have sold" and "have bought" have not the controlling effect given them by the lower Court, and that these words may be used, and still, in certain cases, the agreement be executory. We do not find in the opinions of the trial Court anything to the contrary. It is sufficient to adopt the conclusion that these words *prima facie* indicate the intention to consummate an executed contract and to pass title to the goods *Chenault v. Mauer Co.*, 154 Pac. Rep. 507). It requires no citation of authorities to uphold this view,

and the authorities cited by opposing counsel say nothing to the contrary. Of these cases the Elgee Cotton cases, 22 Wallace 180, may be taken as a type. In these cases and, we think in all the cases cited by counsel in this regard, the subject matter of the sale was not in a position for immediate delivery, but some acts had still to be done by the seller in order to put them in a deliverable state. The contracts thus required certain conditions precedent to be performed by the seller and the Courts held that even though the words "bought" and "sold" were used, still it was obvious from a consideration of the whole contract that the acts remaining to be done by the seller made it impossible to pass an immediate title. In such case the contract was construed as an agreement to sell and not an executed sale.

But in the instant case nothing remained for the seller to do as concerns the goods. The contract and the evidence show that the plate cuttings in question were all in the stock of Getz Bros. at Shanghai. The subject matter was made definite as well as the time for the delivery of the full payment. The numerous conditions which were made a part of the contract almost entirely deal with goods which are en route. They cannot control this contract one way or the other since the goods were already in Shanghai when the contract was made.

It should here be noted that this distinction between an executed and executory contract has no

significance when applied to the facts in this case, as Getz Bros. would if liable at all be liable in either case. The complaint simply alleges that on February 3, 1922, the parties entered into a written contract for the sale of 370 tons of plate cuttings. A copy of the contract was attached to the complaint. Such allegation would have permitted the plaintiff below to have recovered under either construction of the contract. The execution of the document is admitted in the answer (p. 16), the only denial being that it did not constitute a contract of sale by reason of the fact "that the same was not confirmed by defendant's Home Office as provided for in said document". Plaintiff in error, therefore, must now satisfy the Court that no contractual relationship of any kind arose between the parties, and that in legal effect, the result is now the same as if Getz Bros. had never signed the contract or agreed to it. They must construe this contract or document as a mere offer to buy without imposing any obligation upon the seller, so that the seller could have revoked it at any time thereafter, for if it be now claimed that this was even for a moment a "contract" coupled with the condition that it must be confirmed by the Home Office, it at least imposed upon seller's representative in Shanghai the duty of requesting such confirmation from the Home Office. As will be shown hereafter, no such request was made.

The conclusion that this formal document coupled with a deposit of part of the purchase price and

specifically binding upon the *buyer* did not impose any obligations on the part of the *seller,* does violence to the plain general intent or purpose of the agreement. The trial Court held that the particular clause in question, and upon which reliance is now made to show that there was no meeting of minds, was at best a collateral or incidental feature of the contract which would not control its main intent, and that there was an obligation intended to be imposed upon both parties thereby. As already stated the substantive parts of the document show an unequivocal intention to then create a *contract* of sale which would be binding upon both parties, and the burden of showing that any condition negatives this intent must rest upon the party who seeks to avoid the effects of the contract. It must be a condition which is clear and unequivocal. If it be doubtful or ambiguous then such doubt or ambiguity must have been cleared by competent evidence. We submit that defendant in error might well rest his argument upon the simple statement that the clause in question is ambiguous if to be given the force now claimed for it, and that since this ambiguity was in no wise explained, the clause must be disregarded. If there be any possible construction of the clause which will fit in with the main intent and purpose of the contract, and which in this case is obvious, such construction must be adopted by the Court.

2 *Page on Contracts,* section 1122;
Rothrock v. Hunter, 119 Pac. Rep. 1114.

III.

THIS CONTRACT DID NOT REQUIRE CONFIRMATION BY THE HOME OFFICE.

For convenience we restate the particular clause in question:

> "Receipt of deposit Taels 900.00 is hereby acknowledged and we agree to deliver documents on payment, if cable advice from our Home Office permits sale without suit against original buyers. Reply should be receive approximate seven (7) days when written confirmation will be made.
>
> Approved by seller,
>
> Getz Bros. & Co., of the Orient,Ltd.
>
> (Signed) By T. L. Parkhurst,
>
> Manager."

As noted in the opinion of the trial Court this condition "and we agree to deliver *documents* on payment", does not, at least on the surface, mean anything more than the seller might withhold the possession of any *documents,* but it does not state that they will not deliver the *goods.* What documents were meant is not disclosed. No evidence on the subject was introduced, although the plaintiff in error relies upon this condition to negative the otherwise clear provisions of the contract. The duty assuredly devolved upon him to show what these documents were and what relation they had to the delivery of the goods or title thereto. As the case now stands no one can say what documents were intended to be delivered on payment. All that legitimately may be inferred is that there were

certain documents which the seller might wish to retain *notwithstanding it accepted full payment for the goods, and delivered them.* Why it wished to retain these documents we do not know, other than the fact that they were considered important in a possible suit against third parties.

There is another, however, and even more fundamental answer to the contention here made for the plaintiff in error. The condition in question did not provide for any confirmation of this particular sale. It dealt only with the retention or delivery of certain documents, and that this is so is conclusively shown by the subsequent conduct of the seller for the only communication which Getz Bros. claims its Shanghai representative made to the Home Office was the cable:

> "Re Plate Cuttings stock—We understand legally must sue buyers before selling."

As already noted there is here no mention of the fact of the sale to Shirek, *nor is any request* made upon the Home Office for advices. If the contract is as claimed by counsel, viz., that the parties intended that the contract should not go into effect until the Home Office had confirmed it in writing, or at least had sanctioned it without suit against the original buyers, then assuredly the Shanghai representative would have sent a cable containing the necessary information and requesting advice.

The fact that the telegram was sent as above shows that the Shanghai representative at least did

not at that time, give to this clause in the contract the force that is now claimed for it because this would involve the absurdity that in the contract he said that it would depend for its consummation upon advice from the Home Office as to whether or not the sale could be made without a suit against original buyers. and on the same day he cabled, not for any advice from the Home Office, *but simply his view that they must first sue the original buyers.* He asked for no reply. Now if he was then of the opinion expressed in the cable which he sent, he knew when he made the contract that it was necessary to proceed against the original buyers. This construction, therefore, must place Getz Bros. in the position that they knew at the time when the contract was entered into, that it was not binding upon them because they already knew that the suit should be brought before the sale was made. It is not to be presumed that they would have accepted the deposit in question under such circumstances.

The authorities cited to the effect that orders which are taken by drummers or other like agents and which state upon their face that they are subject to confirmation by the Home Office, have no application to this case. Not only does this contract not so state, but it never was referred to the Home Office for confirmation and no confirmation of this or any other contract was asked for.

If we assume that the answer to the cable is correctly set forth in the letter of February 14 in which it was said:

> "We have now received a reply from our Home Office dated February 7, 1922, in which they refer to our message and advise us to take legal proceedings",

there is not the faintest intimation in this reply that the Home Office affirms or disaffirms the sale to Shirek. Obviously they could not have so stated because the Home Office knew nothing of the contract nor does the reply advise that the Home Office agrees with the understanding of their representative as expressed in his cable to them. He was simply *advised* to take legal proceedings, but whether or not this was intended to meanwhile hold up the sale to others, cannot be determined.

It will require the citation of no authorities to demonstrate that a seller does not lose his legal rights against a buyer, if such buyer has refused to accept the goods, and the seller then sells them to others. Not only does such resale not prejudice the seller in obtaining his rights against the first buyer, but the establishment of his damage through the medium of a re-sale is one of the most common remedies followed.

> *Pabst Brewing Co. v. E. Clemens Horst Co.*, 229 Fed. 913.

It surely, therefore, cannot be *assumed* that any condition was inserted in this contract which would run directly counter to one of the most elementary legal principles governing the law of sales. It must be held that the parties did not intend by this cluase to negative the other terms of the contract, and that

it dealt simply with the question of delivery of certain documents. The seller, at least, therefore, did not intend, by the insertion of this clause, to compel a confirmation from the Home Office before there was any contractual relationship established. If the communication which he did send was an expression of what he assumed his duty to be in order to carry out the terms of this clause, then it is clear that he thought that no confirmation was required. Indeed, Getz Bros. to uphold the position now taken must claim that there was no duty upon the part of the Shanghai representative to communicate with the Home Office at all; that he was under no obligation to even notify them that their consent was required. He had it within his power to deprive the contract of any force by simply doing nothing, altho meanwhile the buyer was bound and must assume all the risk of changing market conditions. Not only is such a conclusion opposed to the ordinary conclusion following the execution of a formal document such as this, but it is opposed to any principle of fair dealing.

This subsequent conduct of the parties may be looked to for the purpose of clearing up any ambiguity that there may be in the contract and is one of the most important rules in the interpretation of contracts.

Topliff v. id., 122 U. S. 121 at page 131;
Ins. Co. v. Dutcher, 95 U. S. 269 at page 273;
Nelson v. Ohio Cultivator Co., 188 Fed. 620 at page 624.

If the clause in question be given the force now claimed for it by plaintiff in error, viz., that advices from the Home Office were a condition precedent to the making of any contract between the parties, it is obvious that there must be an unusual and inequitable result such as parties would not ordinarily contemplate. It would mean that the seller, without any obligation on its part, had a binding contract against the buyer which it could enforce at any time on or before February 28th by simply "permitting the sale without suit against the original buyers". This "permission" was optional with seller. It also had a substantial deposit which it could bank or use in the interim. The testimony shows that the market for the goods in question was subject to rapid and radical changes. Under these circumstances the court should be disinclined to construe this stipulation so as to reach the above inequitable result.

Lucy v. Davis, 163 Cal. 611.

This rule of construction is particularly applicable where as here the obtaining of a third party's consent is claimed to have been a condition precedent. Thus in

Antonelle v. Lumber Co., 140 Cal. 309,

the contract provided that the defendant would pay to the plaintiff the remainder of certain funds, provided that the plaintiff, before that time, had obtained the written consent of a third party. The court said at page 315:

> "* * * Assuming that the stipulation on the part of the plaintiff to obtain Antonelle's

> consent was a condition precedent, it is well settled that such conditions are not favored by the law, and are to be strictly construed against one seeking to avail himself of them. (Front-Street R. R. Co. v. Butler, 50 Cal. 577; Deacon v. Blodgett, 111 Cal. 418.) More particularly does this follow, when a strict construction of such condition would work a forfeiture; a result which the law will always endeavor to prevent.
>
> "Equally is it true, that a party will not be permitted to insist on the performance of a condition precedent when, by his own act, or a departure from the terms of the contract, it is found he has prevented the performance of such condition. (1 Wharton on Contracts, secs. 312-603; Hawley v. Keeler, 53 N. Y. 121; Houghton v. Steele, 58 Cal. 421.)"

The last portion of this quotation is particularly applicable to the instant case since the omission of the Shanghai representative obviously prevented any performance of the condition requiring the consent of the Home Office.

See also 13 *Corpus Juris,* p. 569, and cases cited.

The case of *Victoria S. S. Co. v. Western Assurance Co.,* 167 Cal. 348, is instructive in this regard. There a covering agreement for a contract of insurance had been made which provided among other things that the insurance should be subject to the satisfactory survey and loading certificate of the Surveyor of the Board of Marine Underwriters of San Francisco at the port of loading. It was claimed that this contract did not take effect until

the agents of the defendant in San Francisco had been given at least an opportunity of stating whether or not the survey and loading certificate were "satisfactory". The record shows that the certificate was never exhibited to or approved by the agent of the defendant in San Francisco. Nevertheless the contract was sustained upon the ground that under all the facts in the case it could not reasonably be held that the condition named was intended to be a condition precedent.

We, therefore, contend that the parties did not intend by the use of the clause in question, to provide that the contract should have no binding effect unless confirmed by the Home Office. Further, and in any event, that this was a collateral and minor feature of the contract with which Shirek was not concerned, since it referred only to the rights of Getz Bros. as against third parties.

IV.

THE CLAUSE IN QUESTION WOULD NOT CONTROL THE ENTIRE CONTRACT.

This clause is not written in such way as ordinarily would be done if the parties intended that their entire agreement should be subject to a written confirmation from the Home Office. It is not of the character of such conditions as appears in the cases cited in this connection for plaintiff in error. To the contrary it appears only in that portion of the

contract acknowledging the receipt of the deposit money of Taels 900.00. The language is:

> "Receipt of deposit Taels 900.00 is hereby acknowledged, *and* we hereby agree to deliver documents, etc."

The ordinary and grammatical construction which should be given to this clause, therefore, is that it simply relates to the deposit money. This also emphasises the view taken by the trial Court and heretofore expressed in this brief to the effect that any other interpretation would be to defeat the prime object and purpose of the parties as otherwise expressed in the contract.

Marx v. American Malting Co., 169 Fed. 582, supra.

V.

THE SUBSEQUENT OFFER OF SELLER TO DELIVER FIFTY TONS OF CUTTINGS WAS A RECOGNITION OF THE CONTRACT, AND PLAINTIFF IN ERROR IS ESTOPPED FROM NOW DISPUTING IT.

Under date of February 20, Getz Bros. wrote the attorney for Shirek stating:

> "We acknowledge receipt of your favor of February 16, 1922, and beg to advise that *we have been* holding for the above approximately 50 tons of plate cuttings that were shipped for our stock. If they care to avail themselves of this material it will be necessary" etc.

It is said that this amounted merely to a new offer and was not a recognition of the so-called contract,

to which we reply that the letter can have no meaning other than by a reference to such original contract and an affirmation of it. There is here stated no price or terms upon which the 50 tons were to be delivered. It is only by incorporating the letter into the contract that this subsequent offer is made complete or intelligible. The language, "we have been holding for the above" is not the same as, "we now offer to sell, etc.". To the contrary it expressly states that the seller "has been" holding these 50 tons for the buyer. Such holding could have been done only under the contract and this letter, therefore, is a ratification thereof. It was written some time after the alleged cable had been received from the Home Office.

This letter further discloses that the seller had then abandoned whatever previous views he had had concerning the necessity of first suing the original buyers before any sale could be made to Shirek or that he considered essential any advice from his Home Office, for the 50 tons in question were part and parcel of the original stock, and if the seller thought it necessary to bring a suit against the original buyers, such action would apply to the 50 tons as well as to any other portion of the subject matter of the sale. It is admitted that the seller had not commenced any such action, and it, therefore, is an absurdity to say that this alleged necessity of suing the original buyers was fairly considered a condition precedent to the sale or was intended so to be. To this letter of February 20th,

the buyer's attorney on the next day (p. 41) replied stating that his clients were willing to accept said 50 tons, providing that the balance of the cargo would be delivered in forty-eight hours. No reply appears to have been made to this last communication.

The matter stands, therefore, as if the seller had, on February 3rd, when he wrote that he could not carry out the contract, written that he was willing to deliver 50 tons of the cargo under the contract, but no more. Such letter would unequivocally have been a recognition of the validity of the contract as a whole.

VI.

THERE WAS A DUTY ON THE PART OF THE SELLER TO AT LEAST HAVE SUBMITTED THE CONTRACT TO THE HOME OFFICE FOR ITS ACTION.

Reid v. Humber, 49 Ga. 207.

In such case the principal and not the agent is liable.

Mecham on Agency, Sec. 1479.

The cases cited of orders secured by drummers deal with *unilateral* contracts in which nothing is said as to whether or not the order will ever be presented to the Home Office for confirmation. The orders were signed only by the *buyer.* But in the present case the document, whatever its legal effect, was executed by both parties, the answer admitting

that it was executed by the seller. The clause states, "reply should be received approximately 7 days, when written confirmation *will* be made". A fair reading of this clause can convey no other impression than that the seller agreed to submit the contract to the Home Office so that it could be ascertained whether or not such Home Office "promised sale". The word "sale" here, of course, refers to this particular sale to Shirek and not to sales generally.

As heretofore noted the Shanghai representative did not refer the contract in question or the facts of the sale in question to the Home Office at all. The breach of this obligation on its part may be considered as justifying a recovery by the buyer even although the extreme view be taken that the parties did not, by this document, intend that there should be an immediate meeting of minds, except on this one point of the necessity of communicating with the Home Office. It should here be noted that no question of the authority of Parkhurst to fully represent the seller is involved. The admission in the answer is sufficient in that regard. It must be assumed that Parkhurst had the authority so far as his principal was concerned to have agreed to an immediate sale and delivery without reference to the Home Office.

If an agent takes an order, and having authority so to do receives a deposit from the buyer, and in

consideration thereof expressly or impliedly agrees to submit the order to his Home Office, then if he does not comply with this obligation, his principal is liable in damages, for at least to this extent there is an admitted breach.

VII.

THE OPINION OF THE TRIAL COURT (pp. 52-53) CONSIDERS IN ONE ASPECT OF THE CASE THAT THE CLAUSE IN QUESTION IS AN INDEPENDENT PROVISION SEPARATE AND DISTINCT FROM THOSE PROVISIONS WHICH PROVIDE FOR AN IMMEDIATE SALE, AND THAT IN A SEVERABLE CONTRACT SUCH AS THIS, ONE PORTION MAY BE ENFORCED EVEN THOUGH THERE CAN BE NO RECOVERY AS TO ANOTHER AND DISTINCT PORTION.

This statement is but another aspect of the same position, viz., that a special provision of this character should not render nugatory the obvious main intent and purpose of the contract if *any* construction may be given thereto which would avoid such result. To the effect that a failure to comply with minor or non-essential details does not make the entire contract unenforcible, see in addition to the authorities cited by the trial Court,

Spiritusfabriek Astra of Amsterdam v. Sugar Products Co., 163 N. Y. S. 516;

Ramot v. Scotenfels, 15 Iowa 457,

and that a construction which will render the contract valid will be preferred to one which makes it

void or its performance impossible or meaningless see

Williston on Contracts, Sec. 620 and cases cited.

Dated, San Francisco,
October 29, 1923.

WARREN GREGORY,
ALLEN L. CHICKERING,
EVAN WILLIAMS,
DONALD Y. LAMONT,
SCHUHL & SCHOENFELD,
Attorneys for Defendant in Error.